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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 812

MERLE E. PARKER, AN INDIVIDUAL, AND THE FOUNDATION FOR DIVINE MEDITATION, INCORPORATED, A CORPORATION, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Dr. Merle E. Parker established the Foundation for Divine Meditation (FDM) in 1949 for the stated purpose of teaching "the application of certain spiritual, psychological, physical, and methaphysical principals to the problems of daily life" (Pet. App. 38). Parker competely dominated and controlled the activities of FDM, which he described as a "mail order publishing business" (Pet. App. 24, 53–55, 56–57, 58, 68–69).

In 1955, FDM was incorporated as a nonprofit corporation in California, and it sponsored recreational activities and weekly religious services for three of the

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eleven years between 1949 and 1959 (Pet. App. 21, 41, 55, 64). Its principal activity during that period, however, was the publication and sale to the public of various writings by Parker (Pet. App. 20, 22, 24–25, 40, 62). Those writings fall into three general categories: (1) courses in self-improvement ("Dynamic Speed Hypnosis"), (2) programs offering financial reward (how to grow ming trees on window sills or raise earthworms for profit), and (3) promotions of contests and certain causes ("Gospel Treasure Hunt" and "The Cigarette and You") (Pet. App. 22–24, 41–53, 66).

From commercial mailing lists, FDM obtained names of individuals to whom it would send circulars promoting its publications (Pet. App. 40–41, 63). FDM's membership consisted of those who responded to the circulars and who bought its publications (Pet. App. 40–41, 64, 66). Between 1954 and 1959, FDM's income ranged from an annual low of approximately $29,000 to an annual high of $207,435. In 1957, FDM had a surplus of nearly $290,000 (Pet. App. 24, 58, 59).

1. The principal question presented is whether FDM is exempt from income tax under Section 501 (c)(3) of the Internal Revenue Code of 1954, as a corporation "organized and operated exclusively for religious * * * purposes." Both lower courts applied the standard set forth in *Better Business Bureau* v. *United States*, 326 U.S. 279—that the existence of a substantial nonexempt purpose invalidates the exemption even if the organization has an exempt purpose—and they denied the exemption. The Tax Court found that FDM "was organized and operated for a substan-

tial nonexempt purpose, namely, the publication and distribution by sale to the public of Parker's writing" and that FDM "was predominantly a commercial enterprise" (Pet. App. 62). The court of appeals affirmed the denial of exemption in view of the "substantial nature of the non-religious purpose" of FDM which was "commercial rather than * * * religious" (Pet. App. 25).

2. The decisions below do not, as petitioners contend (Pet. 3, 8–10), conflict with *Trinidad* v. *Sagrada Orden,* 263 U.S. 578.[1] That case dealt with a religious organization which obtained the bulk of its income from investments and a trivial amount of income from the sale of wine and chocolate to its member churches. Although this Court suggested that tax exemption depended not on the "source of income" but rather upon its "destination" (263 U.S. at 581), a careful distinction was drawn between the passive holding of income-producing property and the active conduct of trading activities. The Court noted that the bulk of the taxpayer's income there came from rents, dividends, and interest, and that in using income from such investments, the organization was advancing its religious purposes, "not stepping aside from them or engaging in a business pursuit" (263 U.S. at 582). The Court found that trading in wine and chocolate was "purely

[1] *University* v. *People*, 99 U.S. 309, also relied on by petitioners (Pet. 3, 7–8), is inapposite. That case predated the modern federal income tax. This Court held that taxation by Illinois of certain real property of Northwestern University impaired the obligation of contract because the State, which had chartered the university, had promised it perpetual exemption from tax.

incidental to the pursuit of those [religious] purposes and is in no sense a distinct or external venture." 263 U.S. at 581.[2]

A taxpayer whose substantial activities "amount to engaging in trade" such as "selling to the public or in competition with others" is not, however, within the exempt class, even though it also performs religious activities. *Scripture Press Foundation* v. *United States*, 285 F. 2d 800 (Ct. Cl.), certiorari denied, 368 U.S. 985; cf. *People's Educational Camp Society, Inc.* v. *Commissioner*, 331 F. 2d 923 (C.A. 2), certiorari denied, 379 U.S. 839. The reasons which warranted this Court's holding in *Sagrada Orden* that the organization there involved was exempt—the incidental nature of the commercial activities—compel the opposite conclusion here, where both lower courts found that the predominant purpose of the organization was commercial (Pet. App. 24–25, 62). The non-religious nature of FDM's publishing activities is obvious from the titles of the works being sold and from the subject matter of the programs and courses it sponsored.

3. Petitioners' claim (Pet. 3, 10–13) that the decision

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[2] The crux of the opinion is to be found in the following language (263 U.S. at 582):

"As respects the transactions in wine, chocolate and other articles, we think they do not amount to engaging in trade in any proper sense of the term. It is not claimed that there is any selling to the public or in competition with others. The articles are merely bought and supplied for use within the plaintiff's own organization and agencies—some of them for strictly religious use and the others for uses which are purely incidental to the work which the plaintiff is carrying on. That the transactions yield some profit is in the circumstances a negligible factor. Financial gain is not the end to which they are directed."

below violates First Amendment rights lacks merit. The Free Exercise Clause of the First Amendment does not bar the Commissioner and the courts from comparing the claimed purposes of an assertedly "religious" organization with the purposes revealed by its activities. In considering the nature of FDM's activities, both lower courts cautiously resolved doubts in favor of FDM (Pet. App. 21, 22–23, 25, 64, 66–67). Nonetheless, each reached the conclusion that FDM was predominantly a commercial enterprise rather than a religious organization (Pet. App. 22, 24–25, 62, 67–68).

4. Nor is there substance to petitioner Parker's contention that it was impermissible for the courts below to conclude that "unidentified withdrawals" were taxable to him when there was no direct evidence that he had received the money (Pet. 13). Neither Parker nor FDM kept books or records, and their funds were commingled (Pet. App. 26, 58, 70). The revenue agents reconstructed FDM's income from an incomplete set of cancelled checks and bank deposits and were able to classify all of the withdrawals from FDM's bank account except the withdrawal of amounts authorized by Parker between 1955 and 1959 totalling $17,655.92 (Pet. App. 26, 58–59, 70–71). The Commissioner determined that those amounts were taxable to Parker, who had complete and unfettered control over FDM's finances (Pet. App. 27, 70–71). In these circumstances, the burden of proof was properly shifted to Parker. *Reinecke* v. *Spaulding,* 280 U.S. 227, 232–233; *ARC Realty Co.* v. *Commissioner,* 295 F. 2d 98 (C.A. 8); *Marcella* v. *Commissioner,* 222 F. 2d

878 (C.A. 8). When he failed to produce any evidence, both courts below correctly upheld the Commissioner's determination (Pet. App. 27, 70–71). *Burnet* v. *Houston*, 283 U.S. 223.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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